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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

[Protest of GSA Solicitation]

FILE: B-198094, B-198094.2 DATE: November 18, 1980

MATTER OF: International Business Machines Corporation

DIGEST:

1. Protest filed after closing date for receipt of initial proposals is timely because protest resulted from later "clarification" extending disputed new equipment clause to encompass equipment supplied by lease rather than just purchase.
2. Requirement for new rather than remanufactured ADP equipment is not unduly restrictive of competition because agency's refusal to speculate as to whether remanufactured product would meet critical needs was reasonable.

International Business Machines Corporation (IBM) protests certain provisions in GSC-CDPPE-79-00003, a solicitation issued by the General Services Administration (GSA). Specifically, the RFP provided that only new equipment could be offered to meet a requirement for a time sharing system to be used by the Naval Air Test Center at Patuxent River, Maryland. The Request for Proposals (RFP) solicited offers to furnish one basic and a second optional IBM 3032 computer system and peripherals, or equal, including among the peripheral subsystems IBM 3330-11 removable disk drives. These drives are not manufactured as "new" equipment, IBM argues, but could have been furnished as "remanufactured" 3330-11 drives which would have fully met the Government's actual needs. A contract was awarded to Federal Data Corporation notwithstanding IBM's protest.

Moreover, while IBM's protest was pending, other IBM equipment installed at Marine Corps headquarters was removed and replaced by equipment similar to that offered by Federal Data for the Patuxent River procurement. As GSA explains, Navy and Marine Corps personnel permitted

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the equipment to be installed in the mistaken belief that GSA had approved the acquisition and diversion of the optional second system. IBM protested the purported exercise of the option. However, GSA advises that it issued no Delegation of Procurement Authority (DPA) authorizing the Navy or Marine Corps to acquire this system. GSA indicates it will treat replacement of the Marine Corps system as a distinct procurement action and has issued a separate DPA to that effect.

As explained below, IBM's protest under RFP 00003 (Patuxent River procurement) is denied.

Explaining the difference between new and remanufactured equipment, GSA states that:

"It is our understanding that in manufacturing the original disk drives, the components which are used in the unit are stringently tested to meet certain performance criteria. On the other hand, with regard to the used/remanufactured drives, the components as a unit as opposed to the components themselves are tested; and such tests are less stringent. If a deviation occurs during testing, such would be acceptable within a broader tolerance level than permitted for new equipment. In addition, remanufactured drives are normally not 'hot staged' tested, i.e., used in an actual live configuration, for the same duration as new drives, since they had worked previously."

A supporting Navy memorandum attached to GSA's report indicates the critical importance of this equipment to Patuxent River real-time flight test operations which require rapid processing of large blocks of expensive data -- expensive because extensive test aircraft and range facilities must be allocated to each project which is undertaken. In the Navy's view, "substitution of used for 'new' equipment for any of the key/critical components will provide for the likelihood of a greater amount of failures over the 8-year * * * system life."

For its part, IBM responds that this case does not involve a choice of new versus used equipment, but rather concerns the Government's refusal to consider equipment remanufactured from used equipment. Although IBM states that it is unfamiliar with GSA's use of the term "hot staged"

testing, it surmises that GSA is referring to what IBM calls "live configuration testing." IBM states it discontinued such testing as a normal procedure 15 years ago because design, engineering, manufacturing, and testing techniques had advanced to the point that IBM considered it more effective to factory test equipment to performance standards and "field merge" it into the total operating system regardless of whether new or remanufactured equipment is involved.

Confident of the quality of its remanufactured product, IBM is willing to warrant that its remanufactured equipment is the same as new in all significant respects. It is apparently willing to extend to the Government the same rights the Government would enjoy were the product manufactured as "new", would use testing procedures which would be the same as those it would use in manufacturing a new product entirely from unused components, and believes it can support its claim that the quality of its products is no less than that which the Government would obtain by acquiring the drives elsewhere.

In its report to our Office, GSA adopts the awardee's view that IBM's protest is untimely because it was filed long after the closing date for receipt of initial proposals. However, the new equipment requirement contained in the original RFP was written in such a way as to suggest that the requirement applied only to equipment offered for purchase. GSA issued a letter "clarifying" its intention once this matter was brought to its attention by IBM. The letter was intended by GSA to foreclose IBM from proposing its equipment for lease. In effect, the letter amended the RFP, and IBM immediately filed its protest. Because it would have been reasonable for IBM to believe that the Government intended to permit used equipment to be offered for lease but not purchase, IBM's knowledge of the new equipment purchase clause does not foreclose a later IBM protest of the lease restriction. That portion of IBM's protest is timely. Cf. Cardion Electronics, 58 Comp. Gen. 591 (1979), 79-1 CPD 406.

Although, as IBM points out, the procedures used in manufacturing and maintaining ADP equipment are to some degree unique to the ADP field and may justify allowing offerors

to propose "remanufactured" as well as entirely "new" equipment in many instances, we do not believe IBM has shown that the Government's insistence here that only new drives be acquired was unreasonable. Ordinarily, of course, the Government routinely purchases new rather than used or reconditioned equipment. See Defense Acquisition Regulation § 1-1208.

We note, moreover, that in this instance the Navy has not insisted that all of the equipment furnished with the system being acquired be new, but has limited its requirement to those components whose proper operation is considered critical to support real-time flight test operations. We find it convincing, in this regard, that the Navy has demonstrated that its belief that new equipment is necessary reflects a need for equipment which will reduce as much as possible the risk that expensive tests which the equipment will support may have to be repeated because data is lost. (Since IBM has not shown that the Navy's belief that the new equipment clause is necessary was arbitrarily held, we cannot find the clause to be restrictive of competition.) Constantine N. Polites & Company, B-189214, December 27, 1978, 78-2 CPD 437.

How GSA would treat the Marine Corps headquarters matter of course was not known to IBM at the time its second protest was filed. Technically, as the protester concedes, the second protest is moot because exercise of the Patuxent River contract option to benefit the Marine Corps never has and will not occur. We are closing IBM's second protest but will consider later IBM's third protest regarding procedures followed by the Marine Corps in noncompetitively awarding Federal Data a contract for the equipment installed at the Marine Corps headquarters.

Harry R. Van Cleave

For the Comptroller General
of the United States